In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on July 31, 1953, by a specially constituted district court of three judges established pursuant to 28 U. S. C., Sections 2284 and 2385, dismissing appellants' complaint seek-

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ing to set aside an order of the Interstate Commerce Commission, hereinafter called the Commission. Appeal was allowed on September 2, 1953, and the appeal papers were served on September 3, 1953.

The Commission's order, entered August 19, 1952, in No. 30720, *Tennessee Intrastate Rates and Charges*, 286 I. C. C. 41, under the authority conferred upon it by Sections 13 (3) and (4) and 15a (2) of the Interstate Commerce Act (49 U. S. C. 13 (3) and (4) and 15a (2)), requires the railroads operating in Tennessee to increase their rates for the intrastate transportation of wood and of coal, except to Nashville and Old Hickory and intermediate points taking the same rates, by applying "the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by respondents [rail carriers] on like interstate traffic between points in Tennessee and points in adjoining southern States." These proceedings were general revenue cases in which the railroads throughout the United States were authorized to increase their freight rates and charges to meet greatly increased operating expenses.

The authority of the Commission to require intrastate rates to be increased to remove discrimination and preference and prejudice is well settled

The Interstate Commerce Act (Section 13 (4)) confers authority upon the Commission to regu-

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late intrastate rates charged by interstate carriers where those rates cause (1) "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand," or (2) "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Section 13 orders removing discriminations caused by intrastate rates repeatedly have been sustained by this Court.[1]

In *King* v. *United States*, 344 U. S. 254, decided less than nine months ago, this Court upheld an order of the Commission under Section 13 (4) requiring the Florida intrastate rates to be increased by the amounts of the Ex Parte 162 and

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[1] *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Georgia Commission* v. *United States*, 283 U. S. 765; *Louisiana Commission* v. *United States*, 284 U. S. 125; *Louisiana* v. *United States*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474; *Ohio* v. *United States*, 292 U. S. 498; *Mississippi* v. *United States*, 307 U. S. 610; *Texas* v. *United States*, 337 U. S. 911; *New York* v. *United States*, 98 F. Supp. 855, aff'd per curiam 342 U. S. 882; *King* v. *United States*, 344 U. S. 254. See footnote 7 of the *King* decision, p. 259, where the Supreme Court vacated the judgment of the three-judge court in *Montana* v. *United States*, 16 F. Supp. 778 (setting aside a Thirteenth Section order of the Commission) and remanding the case for further consideration. The Montana Court on further consideration sustained the Commission's order (Civil Action No. 586, U. S. D. C., Dist. of Montana, decided June 23, 1953, not yet reported).

Ex Parte 166 increases. The Court discussed at length the findings necessary to support the Commission's order in cases of this kind. The findings there held sufficient, set out in footnote 13, and a comparison of those findings with the findings in the case at bar, leave no doubt of the adequacy of the latter findings. This Court's decision in the case of *United States* v. *Louisiana*, 290 U. S. 70, also makes it apparent that the findings here are adequate.

The Commission's findings adopted by the Court and the Court's conclusions of law

The court below adopted the findings of the Commission, found that they were "supported by substantial evidence on the record as a whole," referred to the evidence supporting the findings, and upheld the Commission's order. We quote below the findings of the Commission upheld by the Court, its references to the evidence supporting these findings and its conclusions of law:

> The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:
>
> 9.1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the other hand, and the adjoining States in southern territory, on the other.

This finding of the Commission is supported by the evidence (Tr. 32–56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I. C. C. 513, 623; Southern Cement Rates, 132 I. C. C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I. C. C. 731; Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646.

10.2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were increased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.

Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I. C. C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I. C. C. 9, 113.

11.3. As to coal there is active competition between persons and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.

The above finding is supported by the evidence cited on pages 47–55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I. C. C., pages 11–14, 18–22, 23–29, 38–42.

12.4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.

Finding No. 4 is supported by Findings Nos. 1, 2, 3 and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I. C. C. 45–46, 58, and Appendix B) and will be found in the record, Tr. 330–403.

13.5. The unjust discrimination and undue preference and prejudice herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on

pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.

Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

14. 6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents revenues.

Finding No. 6 is supported by the evidence, 286 I. C C. 44–45, 55, 58–59; Tr. 8–9, 114–115, 134–135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I. C. C. 44).

15. 7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or to cause undue, unreasonable, or unjust discrimination against interstate commerce.

The findings of the Commission also included a saving clause reading as follows:

> These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole.

CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction of this suite under Sections 1336, 2284 and 2381–25 of Title 28 of the United States Code and Section 17 (9) of the Interstate Commerce Act (49 U. S. Code, 17.9).

2. The Court concludes that the Interstate Commerce Commission had jurisdiction to enter the order complained of under Section 13 of the Interstate Commerce Act (49 U. S. Code, Section 13). *Wisconsin RR Commission* v. *CB&QR,* 257 U. S. 563.

3. The findings of the Interstate Commerce Commission are adequate to support the challenged order of the Commission. *U. S.* v. *Louisi-*

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ana, 290 U. S. 70: *King* v. *U. S.*, 344 U. S. 254, 97 Law Ed. (Adv. page 207).

4. The Court concludes that the Commission order is valid, being supported by adequate findings based on substantial evidence; that the application for an injunction should be denied, and the complaint should be dismissed.

APPELLANTS' CONTENTIONS

With respect to coal appellants contend that the intrastate rates without the Ex Parte 166 and 168 increases are higher than the interstate rates with the increases. The lack of merit in this contention is shown in the Commission's report, pages 47–51, by Exhibit 17, page 9, Exhibit 11 and by the testimony of the witnesses found at the following pages of the transcript: 240–253; 300–302; 474–478, and the exhibits introduced by the witnesses whose testimony is referred to.

Appellants also contend that the cost evidence introduced by them shows that the Tennessee intrastate rates on coal without the above mentioned increases produced greater revenues for the railroads than the interstate rates with such increases. This cost evidence was considered by the Commission at page 54 of its report and found not to sustain appellants' contention.

The record reveals that the cost evidence is also defective in that the average intrastate rate and average intrastate haul include interstate shipments, Tr. 653–655, 686; that the costs shown

do not purport to be the cost of transporting coal but apply equally to any commodity transported in gondola or hopper cars with an average weight of 54 tons per car, Tr. 687, 694–695; and that the same line-haul unit costs were used in arriving at the costs of moving interstate and intrastate traffic although the average intrastate haul of coal was said to be 85 miles and the average haul of coal in southern territory (interstate) was said to be 284 miles (Exhibits 62 and 63). Moreover, the costs shown take no account of the fact that the coal traffic originates on short rail lines and branch lines of the larger rail carriers, and that the majority of the intrastate traffic is handled in local trains whereas most of the interstate traffic is handled in through trains, 286 I. C. C. 41, 47, Tr. 32–36, 47–48.

It is inconceivable that the Tennessee Commission, with power to prescribe intrastate rates, permitted rates in excess of the interstate level, or that Tennessee shippers would have tolerated such rates. *Increases in Tennessee Freight Rates and Charges,* 272 I. C. C. 625, 631.

Appellants further contend that the Commission was required to find that the Tennessee intrastate rates on coal were lower and produced less revenue than the interstate rates with the increases. It is significant that appellants did not request the Commission to make any such finding although Rule 91 (e) of its General Rules of

Practice require that the briefs of parties shall contain "requests for specific findings, separately stated and numbered * * *." However, the Commission's findings 4, 5, and 6 show that it concluded that the intrastate coal rates were lower than the interstate rates and were not contributing their fair share of the revenues required by the railroads. These findings and findings 1 and 2 also show that the intrastate rates were abnormally low. Such findings are adequate and are supported by the evidence.

In regard to the contention made by appellants that the Commission erroneously assumed that the burden of proving that the intrastate rates on coal were less than the interstate rates was on plaintiffs and not on the railroads and that the railroads did not and were not required to carry this burden, it is submitted that there is no substance to such contention. The Commission's report completely refutes this contention and shows beyond any reasonable doubt that the burden of proof was placed on the railroads and was sustained by them.

Appellants question the validity of the Commission's order as to coal on the ground that the finding as to preference and prejudice is statewide. They direct attention to the following statement in the Commission's report (p. 59):

> As to coal, the record also warrants the determination that some of the Tennessee intrastate rates unduly prefer certain ship-

pers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce.

It is submitted that the words "some" and "certain" were used because the rates to Nashville and Old Hickory and intermediate points taking the same rates, were excluded from the finding of persons and localities preference and prejudice, as well as from the finding of unjust discrimination against interstate commerce. It is clear that the word "some" used in the finding modifies "intrastate rates" and includes all of such rates except those "to Nashville and Old Hickory and intermediate points taking the same rates." It is equally clear that the word "certain" modifies "shippers and localities" and includes all intrastate shippers and localities in Tennessee, except those whose coal is shipped to Nashville and Old Hickory and intermediate points taking the same rates. This is made clear by Findings Nos. 4 and 5, *supra*, p. 4.

Georgia Public Service Comm. v. *United States*, 283 U. S. 765, and *Louisiana Public Service Comm.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, sustain the Commission's findings and order.

THE FINDINGS AS TO PULPWOOD

Appellants also contend that it is unlawful for the Commission to require that the intrastate rates on pulpwood on several of the railroads op-

erating in Tennessee be increased above the level authorized by the Tennessee Commission when that level is already above the interstate rates maintained by two railroads—the Southern and C. N. O. & T. P.—in the absence of any showing of a difference in operating conditions or need for revenue.

The Commission simply required that the Tennessee intrastate rates on pulpwood, of the railroads affected by the order, be increased to the same extent that their interstate rates had already been increased. It found that such an increase was necessary to remove unjust discrimination against interstate commerce. This was clearly within the authority conferred upon the Commission by Section 13 (4) and there is no contention that the intrastate rates as increased are unreasonable.

When the case was heard before the Commission the rates on pulpwood were not upon a uniform level but no contention was there made that the differences in these rates resulted in discrimination among shippers on different railroads. The Commission did not find that the difference between the interstate and intrastate rates on pulpwood resulted in persons and localities preference-and-prejudice discrimination and there is no reason to believe that the differences in these two rates result in such preference and prejudice. The Court's attention is called to the saving clause in the Commission's report, p. 60, that;

> These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

Appellants, or any shipper, may apply to the Commission for a modification of the order if they feel that the rates contravene the provisions of the act. In *Georgia Comm.* v. *United States,* 283 U. S. 765, at p. 772, this Court said:

> The order here challenged is state-wide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627. Such

specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. * * *

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial question, and that this Court has settled the issues raised in this appeal in the numerous cases heretofore cited. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

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